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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1331

ERNEST MONTANYE, Superintendent of Attica Correctional Facility,

Petitioner,

against

ROBERT CLAYTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office and P. O. Address
80 Centre Street
New York, New York 10013
488-3443

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

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Petitioner, the Superintendent of Attica Correctional Facility, successor to Vincent A. Mancusi, in whose permanent custody respondent was committed, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *Vincent A. Mancusi* v. *United States ex rel. Robert Clayton* (judgment entered on January 17, 1972). On petitioner's motion, the mandate was stayed by the Court of Appeals on March 15, 1972. Fed. R. App. Proc. 41(b). On March 23, 1972, the Court of Appeals ordered bail to be set for respondent at $500 personal recognizance without surety and petitioner was released from the Suffolk County Jail on March 28, 1972, by United States District Court for the Eastern District of New York.

Citations to the Opinions Below

The opinion of the United States District Court for the Eastern District of New York *sub nom United States ex rel. Clayton* v. *Mancusi* is reported at 326 F. Supp. 1366. The opinion of the United States Court of Appeals for the Second Circuit is reported at 454 F. 2d 454.

The opinion making findings of fact and conclusions of law in denying the motion to suppress the confession which was rendered by the County Court of Suffolk County on July 19, 1965 in the related state coram nobis proceeding is unreported. It is reproduced as Appendix "A" to the petition. Affirmance of the Appellate Division, First Department is reported *sub nom People* v. *Clayton* at 28 A.D. 2d 543 and at 279 N.Y.S. 2d 605 (1967). The affirmance of the New York Court of Appeals is reported at 22 N.Y. 2d 841 and at 293 N.Y.S. 2d 104 (1968). The denial of certiorari by this Court is reported *sub nom Clayton* v. *New York* at 394 U.S. 909.

Jurisdiction

The judgment of the Court of Appeals was entered on January 17, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Questions Presented

1. May the federal courts reject the findings and conclusions of the state courts after a full and fair hearing has been held on the admission of a confession when the federal court hearing merely reiterates the same testimony six years later and 19 years after the events in question?

2. Where all persons with knowledge of the circumstances of the 1952 murder of an itinerant farm laborer were his fellow workers who had completed their jobs in

New York and were on their way to Florida, was a confession coerced under the totality of the circumstances because the confessor was not warned of his rights to counsel and to remain silent and because he was detained as a material witness when he was not physically or psychologically abused or tricked?

Statement of the Case

Respondent Clayton was convicted of Murder in the Second Degree upon the verdict of a jury after a trial upon an indictment charging him with the premeditated murder in the first degree of Candice Nelson in the County Court of Suffolk County. The murder occurred on a potato farm in East Northport on Sunday, November 2, 1952, the night after the itinerant workers had received their last pay for the season. Both Clayton and Nelson were transient laborers on that farm and both were Florida residents.

Nelson's body was found on Monday afternoon, November 3, 1952 in a potato shed near the dormitory for the itinerant workers. His head had been bashed in the night before and he had no money on his person or in his room, yet Nelson was reputed to have been prudent with money and to have had substantial savings. The police took all the farm workers to the Huntington Police headquarters and questioned them concerning the homicide. They were not held as suspects. In fact, they were not held at headquarters at all. No one asked to leave, but it was the understanding of the detective that they would be allowed to leave. In view of the peculiar timing of the crime—after the last pay of the potato season in Suffolk County when all potential witnesses were on their way to parts unknown—holding all the workers together in the detective room was not evidence of an intent to coerce a confession from Clayton. The police conducted a complete investigation around the clock in order to accommodate the coworkers of the deceased. All the workers were questioned *seriatim*. Clayton was questioned early in the morning of November 4, 1952 and the text of that statement (Appen-

dix B p. 4a, *et seq., infra*) indicates that Clayton was not the target of the investigation. The officers were merely seeking information.

The first suspect was B. J. Mickens whose footprints were found in the potato shed. He alibied that he went into the barn Monday morning to dispose of a tire and that he had been away all weekend with friends in New York City and in New Jersey. On November 4, he summoned the investigators and confessed to the crime; but almost immediately retracted that admission and claimed that Clayton had committed the murder and that he had helped him to dispose of the body. While Mickens' various conflicting stories were checked, both he and petitioner were arraigned as material witnesses, although no presentment to the grand jury had begun. Clayton and Mickens then were placed in individual cells in the headquarters. The next morning Mickens' original alibi was confirmed, showing that Mickens could neither have killed Nelson nor aided in the disposition of the body, since he was not at the farm until Monday morning. His accusation of Clayton therefore was shown to be false.

Meanwhile a new suspect had come into the picture—a man named "Brad" who had been the big loser in a previous crap game. He was brought to headquarters while the police sought someone who had changed a $100 bill on Sunday night, since it was discovered that Nelson had received such a bill shortly before he was killed. A bar owner who had changed such a bill on Sunday was brought to headquarters and shown the workers and Brad, but she was unable to identify any of them. Clayton was not presented to her, but Mrs. Spatafora spotted Elinora Barnett sitting in the back room and identified her as being with the man who changed the bill.

While the courts below found that evidence to be "inconducive", it was only after that identification that petitioner admitted that, prompted by greed, he had committed the bloody crime in a statement (Exhibit C p. 14a, *et seq., infra*) tinged with remorse. He thereafter led the officers to numerous pieces of tangible evidence which were introduced at trial.

Petitioner was found guilty of Murder in the Second Degree by a jury and given sentence of 30 years to life. No appeal was taken, but in 1965, he sought a writ of error coram nobis in the Suffolk County Court, alleging a violation of his rights under *Jackson* v. *Denno*, 378 U.S. 368 in that a confession was introduced at trial without a prior judicial determination of voluntariness. He also claimed that his confession was involuntary because he was tired and hungry when it was made. A hearing following the procedures enunciated in *People* v. *Huntley*, 15 N.Y. 2d 72 (1964) was held on June 8 and 9, 1965 before the Honorable Thomas M. Stark in the Suffolk County Court. On July 19, 1965, Judge Stark concluded that the confession was voluntarily given based on his findings of fact (Appendix A p. 1a, *et seq.*, *infra*).

The Appellate Division, Second Department, affirmed the judgment, Judge Christ dissenting (*People* v. *Clayton*, 28 A.D. 2d 543 [2d Dept. 1967]). The denial was further unanimously affirmed by the New York Court of Appeals, 22 N.Y. 2d 841 (1968) and this Court denied certiorari, 394 U.S. 909 (1968).

On November 16, 1969, petitioner Clayton sought relief on similar grounds in the United States District Court for the Eastern District of New York. Respondent submitted the entire prosecution file in the case including, not only transcripts, but the investigative materials as well.

On May 19, 1970, Judge Bartels appointed Maurice Brill, Esq. to represent petitioner and on July 22, 1970 ordered a hearing on the application. The subject matter of the hearing was not more definitely described. That hearing was held on October 8, 9 and 13, 1970. All of the witnesses had testified at the State Court hearing six years previously, except for a former Assistant District Attorney who remembered nothing of the events to which he was asked to testify. The State hearing had included the testimony of three additional investigators.

Seven months later on May 14, 1971, the District Court issued a writ of habeas corpus. Judge Bartels dismissed the State Court determination as "skeleton findings" (326 F. Supp. 1366, 1367). After an independent analysis of the facts the District Judge stated that he used the test of "'the totality of the circumstances'" and that Clayton's will was overborne, making the confession inadmissible (*Id.* at 1369).

The Court of Appeals affirmed the decision below including the District Court's substitution of itself for the State Court as the trier of fact on the ground that it was not clear that the latter Court had applied the appropriate standard. 454 F. 2d 454, 456.

REASONS FOR GRANTING THE WRIT

1. The decision below in failing to give due deference to the State Court's findings represents a fundamental misinterpretation of the limitations contained in the Federal Habeas Corpus Statute (28 U.S.C. § 2254[d]) which could affect a large portion of habeas corpus cases where the State has provided a full and fair constitutional remedy.

The District Court, in substituting itself as trier of fact, when a full and fair hearing had been held in the State Courts oversteps the limitations placed on the District Court by 28 U.S.C. § 2254(d). In the interest of comity and judicial economy the State Court hearing should not be subject to reinterpretation by a District Judge.

When adequate procedures are used to test issues of fact in the State Courts, the District Courts may not try them *de novo*. To permit the district to overrule the State judgment here trivializes the intent of Congress to respect the primary State concern for disposing of its own criminal cases only two oblique criticisms of the State proceeding are made by the Courts below—that the findings are skeletal and that it is not clear that the correct standard was used.

It is clear that the State Court evaluated the facts of the case which means considering the totality of the circumstances; and its decision is entitled to a presumption of correctness not the niggardly suspicion it received from the Courts below.

While the District Judge deprecates the orally delivered opinion of the State Judge as insufficiently detailed, there were sufficient factual differences to create a head-on clash between the two finders of fact.

The County Court found "That during the above-mentioned periods the defendant was permitted to sleep and given food at regular intervals." (App. A p. 3a, *et seq., infra*) That finding was rejected by the District Court although it was candidly admitted that there was testimony to support that finding. In contrast, the District Court held ". . . that Clayton's faculties might well have been impaired and his will to resist significantly eroded by inadequate sleep and food." (326 F. Supp. 1366, 1371).

The County Court found that respondent Clayton was interrogated at various times or from time to time and that law enforcement officers did not promise, coerce or direct respondent's answers (Appendix A p. 3a, *infra*). The District Court found "persistent interrogation . . . by . . . a team of interrogators." (326 F. Supp. 1366, 1371).

Furthermore the testimony before the State Court provided a fresher and more complete record of the events in 1952 than the Federal hearing six years later in which no witness, except possibly Clayton, had any clear memory of the details of the investigation. Further, the assessment of credibility by the State Court is more reliable since the decision was rendered on the record shortly after the hearing. The decision of the District Court was rendered seven months after the hearing. This delay also may explain the greater detail in the Federal, than in the State, findings; but it does not bolster the superiority of the Federal, over State, proceedings.

The determination of voluntariness here turned on an evaluation of the facts based on the constitutional standard of whether, under the "totality of the circumstances", the defendant's will was overborne, e.g. *Procunier* v. *Atchley*, 400 U.S. 446; *Frazier* v. *Cupp*, 393 U.S. 821; *Davis* v. *North Carolina*, 384 U.S. 737; *Johnson* v. *New Jersey*, 384 U.S. 719. This factual evaluation is peculiarly the responsibility of the State Courts under *Jackson* v. *Denno*, 318 U.S. 368. In that case this Court retroactively required independent judicial determinations of voluntariness to be made by State Court judges. The State Court hearing here was held under the auspices of *Jackson* v. *Denno*, *supra*, and fulfilled this Court's requirements. As in *Procunier* v. *Atchley*, *supra*, this fair procedure ought to preclude federal intervention.

This case which presents the Federal Courts in a role of second-guessing a conscientious police investigation of a very serious crime is an appropriate vehicle for this Court to clarify the limitations placed on the District Courts by 28 U.S.C. § 2254(d).

2. The decisions below in judging the confession on the basis of technical legal objections seriously misconstrued the doctrine of totality of the circumstances in violation of decisions of this Court.

Of the six factors* relied on by the Court below to support involuntariness, the first three are technical legal objections not related to the will of the accused.

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* ". . . . (1) the failure to advise petitioner, an indigent and uneducated suspect, of his rights to counsel and to remain silent; (2) the 'sham' arraignment as a material witness for the purpose of retaining police dominance over petitioner; (3) the unreasonable delay in arraignment as a defendant for over 60 hours after having been taken into custody; (4) doubt that petitioner had adequate food and sleep; (5) persistent interrogation by a skilled team of investigators; and (6) continual questioning over a period of two and a half days." (454 F. 2d 454, 455).

The failure to give the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, fourteen years before that decision was announced certainly is not a prime basis for finding coercion. If it was, this Court's decision in *Johnson* v. *New Jersey*, 384 U.S. 719, in which it refused to upset a past conviction when such a warning was not given would be rendered a nullity. The decision below is, in this respect, in direct conflict with *Procunier* v. *Atchley, supra*, which it fails to distinguish.

While the Court below claims that the arraignment as a material witness was a sham procedure, uncontroverted evidence demonstrates that Clayton was arraigned at a time when the investigation had not focused on him alone. Mickens, also committed as a material witness, and Brad who was brought to the headquarters thereafter were equally suspect. In fact, Mickens' statement against Clayton was found to be fabricated prior to the confession. The arraignment was perfectly legal except for the technicality that the Grand Jury which would have to hear evidence of this homicide had not yet been impanelled.

Furthermore no connection between Clayton's arraignment and his state of mind is drawn.

The third factor relied on by the Court below is that the confession was the product of an illegal delay in arraignment. Such delay is not a basis for finding that a defendant's admissions were coerced (*Palmieri* v. *Florida*, *cert. dism. as improvidently granted*, 393 U.S. 218 [1968], *reh. den.* 393 U.S. 1045). This is especially so, since Clayton had been arraigned as a material witness. The 30 hours delay counted by the Court begins with Clayton's arraignment as a material witness on the assumption that he was the target of the investigation. Had the officers charged petitioner based on Mickens' unreliable statement, it would have been a false charge. Further investigation was needed if the State were to adopt Mickens' latest version of events as its own. See *Glinton, United*

States ex rel. Glinton v. *Denno*, 309 F. 2d 543, 545-6 (2d Cir. 1962), *cert. denied*, 372 U.S. 938 (1963), 339 F. 2d 872 (2d Cir. 1964), *cert. denied*, 381 U.S. 929 (1965).

Thus while claiming to consider the totality of the circumstances the Courts below did not consider Clayton's state of mind, but were distracted by technical errors of the Constable made many years previously. By contrast, the text of Clayton's statements (Appendices B, C and D p. 4a, *et seq.*, *infra*) demonstrates that the confession was voluntary, as found by the State Courts, and made because of remorse, rather than overbearing.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted.

Dated: New York, New York, April 13, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

APPENDIX A

Findings of Fact and Conclusions of Law of Hon. Thomas M. Stark, County Judge of Suffolk Co., denying motion to suppress a confession, dated July 19, 1965.

The Clerk: Decision re voluntariness of confession, People against Robert Clayton.

The Court: At the conclusion of the hearing or non-jury trial previously held before the Court from the issues raised by this defendant's writ of error, the Court reserved decision on the contested issues of fact and issues of law. The Court at this time is prepared to read into the record its decision setting forth its finding of fact and conclusions of law.

After hearing and considering the evidence and testimony adduced upon this hearing, I do hereby find as matters of fact beyond a reasonable doubt as follows:

1) That on the afternoon of November 3rd, 1952, a number of persons, approximately ten in number, all of whom resided upon or were employed at the Gozelski Farm in East Northport, were taken to the then Huntington Town Police Department headquarters for questioning in connection with a homicide which had occurred at said farm the previous day, November 2, 1952. Among those brought in for questioning was the defendant. That the defendant, along with the others, was questioned by various police officers from time to time during the night of November 3, 1952 and during the day of November 4, 1952, but the defendant at these occasions denied any connection with the homicide;

2) That at approximately 9 p.m. on November 4, 1952, the defendant was brought before the then County Court Judge Fred J. Munder and arraigned as a material witness to the crime; that the defendant was unable to post the bail of $10,000 as fixed by Judge Munder and was thereafter held in custody of the Sheriff of Suffolk County as directed by the Court;

Appendix A

Findings of Fact and Conclusions of Law of Hon. Thomas M. Stark, County Judge of Suffolk Co., denying motion to supress a confession, dated July 19, 1965.

3) That the defendant was again interrogated by the police at various times during the day of November 6, 1952, and during the evening hours of that day the defendant made certain oral incriminatory admissions as to having killed the victim at the Gozelski Farm on the evening of November 2, 1952; that commencing at 10:10 p.m. on November 5, 1952, the defendant was interrogated by the then District Attorney's investigator Walter Weeks in the presence of a court stenographer who recorded and took down in shorthand the questions put to the defendant by Mr. Weeks and the defendant's answers thereto;

4) That thereafter and following said questioning defendant was taken by the police to the Gozelski Farm at East Northport where he made further oral incriminatory admissions to the homicide; that the defendant was then brought back to the Huntington Town Police Department headquarters and that approximately 2:16 a.m. on November 6, 1952, the stenographer's transcript of the questions and answers which in the meanwhile had been typed was read to the defendant by Mr. Weeks. The defendant made or directed certain changes thereon and initialed the transcript accordingly. At that time the defendant orally acknowledged the truth of his answers recorded in the transcript. The transcript was marked in evidence in the hearing on this writ as People's Hearing Exhibit #1;

5) That at no time between the afternoon of November 3, 1952, when the defendant was brought in for questioning, and his arraignment as a material witness before the Court at approximately 9 p.m. on November 4, 1952, did the defendant ask to see or contact an attorney, nor did the defendant at any time between his arraignment as a material witness and his final acknowledgment of his

Appendix A

Findings of Fact and Conclusions of Law of Hon. Thomas M. Stark, County Judge of Suffolk Co., denying motion to supress a confession, dated July 19, 1965.

question and answer statement at approximately 3 a.m. on November 6, 1952, ask to see or contact an attorney;

6) That during the above-mentioned periods the defendant was permitted to sleep and was given food at regular intervals; that no police officer or other law enforcement official made any promises to the defendant in order to induce him to give any oral incriminatory admissions, nor did any officer or official direct the defendant to change any of his answers on People's Hearing Exhibit #1 or tell the defendant what to say or write.

I therefore conclude as a matter of fact and law that the oral incriminatory admissions made by the defendant to the investigating police officers during the evening of November 5, 1952, at Huntington Town Police Department headquarters and during the early morning hours of November 6, 1952, at the Gozelski Farm in East Northport, including that portion of which was recorded and transcribed in People's Hearing Exhibit #1 were voluntarily made and given by the defendant and were properly admitted into evidence upon the trial of this defendant.

Accordingly, the Writ of Error Coram Nobis is hereby denied. The defendant will be remanded to the custody of the Suffolk County Sheriff for transportation to the particular institution of the New York State Department of Correct from which he came.

APPENDIX B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.*

Police Headquarters
Huntington, New York
November 4, 1952

PRESENT: Robert Clayton.

Walter W. Weeks, Investigator, District Attorney's office, Suffolk County.

William van Sise, Detective Sergeant, Huntington Town Police.

Alfred C. Kohler, Detective, Huntington Town Police.

Victor F. Bruns, Court Stenographer.

(The questioning of Robert Clayton began at 5:02 a.m.)

By Mr. Weeks:

Q. What is your name? A. Robert Clayton.

Q. How old are you? A. Twenty-three.

Q. What is the matter with that thumb, the one you just hit there? A. Which one? When I am asleep, the whole hand is asleep. I got that with the grader.

By Mr. Kohler:

Q. Where did you get this? A. She was trying to find the matches, and it struck me right across there. I could not see. My little finger there. It just—that must have been Thursday or Friday morning. I just disremember. Friday morning or Thursday morning, when she got up.

* Introduced Petitioner's Exhibit 1 at the hearing in the District Court (Exh. 14 p. 52).

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

By Mr. Weeks:

Q. How long have you worked out at John Gozelski's farm? A. Since I got out of the jail; when I got out of Riverhead. I had tried to move away before I went to jail. He didn't have any room. They had better potatoes over there. After I got out of jail, the man didn't want me to stay there any more. I came to town. I walked to town. When I came to town, I thought about Sam. I goes in over there. I finds there is a whole room vacant. So I goes.

So he said, "We don't need a potato picker. We need a day man."

I had some place to go.

So I went back to camp and I told Peggy about it. "You can pick potatoes if you want to, but I will be working by the day. You know, the strain on my arm."

We moved in right there. We have been there.

Last Saturday I drawed two checks, two weeks.

Q. What was your last check Saturday? A. She picked up some potatoes and made $17.60, and I made five dollars and a half—I makes ten dollars a day. I make fifty-five. His check was made (for) $72.60.

Q. Where did you cash the check? A. I cashed the check at the A. & P. store. I went to see Mr. Tucker, I believe his name is; so he cashed it.

Q. The A. & P. store where?' A. Up in East Northport.

Q. You got paid Saturday? A. Right.

Q. Around noon time? A. I got paid right at noon time.

Q. When did you cash the check? A. About twelve thirty.

Q. You went with Beejay? Now, where did you go after you cashed the check? A. I came back to the house.

Q. Go ahead. How long did you stay there? A. I stayed there until, oh, about—I don't know. I went over to Fanny's.

Appendix B.

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

Q. Who went to Fanny's with you? A. Me—and I just can't tell you the name. The lady was standing in the room downstairs: her and her husband.

Q. Is that Charlie and Lettie? A. Charlie and Lettie, that is right. We all went over there with a man with a Buick.

Q. What time did you come home from there? A. I came home from there at nine o'clock.

Q. At night? A. Right. Saturday night.

Q. Did you work Sunday? A. No, sir.

Q. Did you see Candy Sunday? A. I seen Candy Sunday from about—I got up out of bed at about two o'clock. I seen Candy from two to four thirty.

Q. What was he doing? A. He came back from town while I was there and went into his room.

Q. Whom did he come back from town with? A. By himself.

Q. How? A. When I see him, he was walking.

Q. Did he cook food? A. He cooked. He borrowed some lard from us.

Q. Then what happened around four thirty? A. The fellow what was staying with him, named Murray. I think, if I am not mistaken, he and two other fellows was in the car. They came out there. I (?) was in the car. I hear them talking. Murray told them about going somewhere and having a party somewheres, and at first Candy didn't want to go. "I got to stay here."

Murray was getting something to eat, and Candy said, "I don't want to go with you all."

But anyway Candy made up his mind and went along with him, and when the car left there—

Q. Did you see them push the car at any time to get it started? A. No. The man kept his motor running.

Q. Is that the fellow (indicating a man known as "Popeye.")? A. I could not see his face, but it seemed to be larger than this fellow.

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

Q. How about Hamilton? Is he bigger than you? How many was in the car? A. There was three in the car. After Candy got in the car, it made four.

Q. Now, after they got in the car, you haven't seen Candy any more? A. I didn't see Candy any more. Candy sat in the back seat. I watched the car as it went around that way.

Q. Where was Murray sitting? A. Murray was sitting in the front. He got out. I didn't see his face. I didn't pay his—he had some of his Army—

Q. With the big pockets? A. The fellow that was sitting in the back with Candy, I didn't get a good look at him. I didn't pay him much attention—the first time I had ever seen him.

By Mr. van Sise:

Q. What kind of a car was that? A. It looked like a Rocket "88," an Oldsmobile.

By Mr. Kohler:

Q. What color? A. Dark gray. I said dark gray. I know the color.

By Mr. Weeks:

Q. When did you go out Sunday? A. I went out Sunday about a half an hour after Candy went away . . . I left with my wife. I said, "Let's go away."

Q. Where did you go? A. We left the house. We had no way to go. We went up towards Northport. A taxi came by. I stopped him. He took us up. He charged us fifty cents.

She had some curlers over to Johnnie's camp that she let a girl use; possibly we can get them from her.

We got another taxi. A fellow—I believe his name is Johnnie; he drives a Dodge—he carried us out there.

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

We went over to the bar. We went there. It is my first time I have been in this place. It sounded like the name of "Purdy." "Dixie Belle." They was doing a dance there.

Q. That is Sunday night now? A. That is Sunday night.

Q. How late did you stay there? A. Oh, we stayed there, I would say, about a half an hour; maybe a bit longer. She goes into the dressing room. We had two drinks. We got up there. We walked down the street. We window shopped.

Q. Whom did you get to take you home? Was it a taxi? A. No, he wasn't a taxi. We got a boy to bring us back. He only charged us two dollars to bring us back.

Q. What time did you get back? A. It was about twelve o'clock at night.

Q. Whom did you see around there when you got back? A. At the house?

Q. That is twelve o'clock midnight, Sunday night. Whom did you see around? A. When I got home? No one, when I got back.

Q. Did you see Beejay's car there? A. No, I didn't.

Q. Did you see a dog around there? A. No, I didn't.

Q. Did you see any lights in any of the other rooms?

By Mr. Kohler:

Q. Did you see any other cars? A. No, I didn't

Q. Did you hear any commotion? A. No, I didn't.

By Mr. Weeks:

Q. When you went to bed, after you went to bed, did you hear some noise or an argument? A. No, I didn't.

Q. In what do you get your kerosene? A. In the jug.

Q. What size jug ? A. A gallon jug.

Q. How many have you got of them? A. I only use one jug. I only have one jug.

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

By Mr. Kohler:

Q. Where did you get the jug that you use? A. I got the jug from in front of Lettie's house.

By Mr. Weeks:

Q. Do you live in the room next to Candy's? A. Right.

Q. You didn't hear any noise at all? A. I didn't hear any noise at all.

Q. Have you ever borrowed any money from Candy? A. I borrowed ten dollars from Candy.

Q. Did you pay it back? A. Sure, I paid it back Saturday.

Q. Did he charge you anything for the use of it? A. He charge me nothing at all.

Q. Did Fraser ever borrow any money from him? A. Fraser? I have heard all the boys say they borrow from him.

Q. Different people went and borrowed money over there? A. Nearly everybody there.

Q. Why would you borrow from him? Did he have a lot of money? A. They say he had a lot of money. I have seen his money. He lent me ten dollars.

Q. It seemed to be known around there that he had ten dollars. You didn't ask Sam for ten dollars; you asked Candy. A. I borrowed ten dollars from the other fellows. Lettie's husband: I borrowed ten dollars from him when I first got there.

(There was some discussion, off the record.)

By Mr. Kohler:

Q. How much money have you got? A. Twenty bucks.

Q. Have you got any home? A. No.

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

Q. How come you wanted to go to Florida, yesterday or the day before? A. I did want to go and I didn't want to go.

Q. What made you decide to go to Florida this morning? A. I wasn't going to Florida. I was running on with Beejay, because he first said he was going to Florida. I said I was going with you (him?).

Q. You told him this morning you wanted to go? A. He may have thought—

Q. You have got all your stuff packed? A. I have got al my stuff packed?

Q. It is in cardboard boxes. A. That is all we keep it in: all the dirty clothes, everything, we keep in a box.

Q. Whom else do you hang out with? A. I don't particularly hang out with anyone. I don't go with anyone. If I don't go out with my wife, I don't go out with anybody else.

Q. Did anybody visit you last night? A. No, not last night, not that.

Mr. Weeks: Any more, Sarge?

By Mr. van Sise:

Q. Getting down to this morning here, what time did you get up Monday morning? A. Monday morning? I got (up) about fifteen minutes to seven.

Q. What did you do there? A. Well, I goes to see the man—I was working—to grade the potatoes.

Q. You didn't work? A. I didn't work.

Q. Then what did you do? A. Came back to the house.

Q. Then what did you do? A. I was just standing around. Came back in the room and warmed up something to eat.

Q. Did you go into anybody else's room? A. I went down to Beejay's room. I said, "Did everybody come home? Did everybody come home last night?"

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

I just looked around the door; saw Candy's lock was still on the door. I asked them in the room, "Have any of you ever seen Candy?"

Beejay said, "I see Candy in the barn last night. I seen his feet."

I said, "What was he doing in the barn? He must have been drinking."

I didn't pay no attention. That conversation just dropped.

I came back in the house. I fumbled around, and Beejay was fixing around on his car. He had a two-tone horn, but it wouldn't blow. He got through. I went back on down to John's, to help him move a wire. He was across the field. Electric wire; and after I moved the wire, I went back to the house. After a while Beejay, he left.

Q. What time do you think Beejay left there? A. This morning? It had to be after eight. Sure, because seven was when I got up, just before seven.

Q. As far as you know, nobody went up to the barn and looked if Candy was up there or who it was? A. No, because at one time I started in the house and Beejay was working right around there. I never seen him go to it. I never think about it. I know he should not have been in there. His room was right there.

Q. You didn't ask the boss where Candy was? A. No, I didn't.

Q. Did you tell him at any time during the day that Beejay told you he was up in the potato shed there? A. No, I didn't.

Q. When did you first know? A. When Foots came down there.

Q. Is that one the bosses? A. That is the boss' son. I had just opened up. He came down in his car with a hammer. I just came out of the door. He said, "Robert, come here."

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Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

I came in there. He said, "Who is it?"

I looked in there. I could not see who it was. I could just see his legs.

Q. When did you learn it was Candy? A. Well, by his clothes—because his clothes was like that he had on. I went down and got a bucket of water. Foots said that I had better stay here, and the police came and came right down there. I went back. Still, all the same, blood was on the side of the wall.

Mr. Weeks: Well, I guess that is all, Sarge.

By Mr. van Sise:

Q. You don't have any idea who done that? A. No, I don't, because Candy—he didn't threaten with anyone. They wasn't arguing any. I don't know who could have done it. I wish I did know. I wish I had the slightest idea that might prove who did it—the son-of-a-bitch who did it.

(The questioning ended at five thirty-five a. m., but the following occurred within a few minutes of that time, when the same people were talking:)

A. (By Robert Clayton) I was in West Palm Beach when I got shot there. There was a big fight in the bar. I was on the outside. I was walking down the street. I heard a couple of shots.

By Mr. van Sise:

Q. Did you ever report it to the police? A. No, I didn't report it. The blood went all the way through there. I had been shot. I went down to the drug store. I got

Appendix B

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 4, 1952.

some alcohol and some healing salve and I bandaged him (it?) up.

Q. You were locked up once for burglary? A. Sure.

Q. Was that a house? A. That was a house. I done time for it over in the state penitentiary.

Q. How old were you then? A. To tell you the truth, I was seventeen, if I am not mistaken. I was arrested in 1946. That is when I went there.

Q. You have been arrested for gambling, too? A. Sure.

By Mr. Weeks:

Q. When did you last see Fraser—Sleepy? A. I last seen Sleepy Saturday night when they were leaving there.

By Mr. van Sise:

Q. Saturday night or Saturday afternoon? A. It was afternoon.

Q. Did you hear that he had to come back? A. And I heard that this morning, after I found out the boys was up there. A boy and a girl, they got lost somewhere, they say. They say he was coming back to get his check cashed. He was over by New York. He didn't know anybody. That is when I knew Sleepy—but I haven't seen him.

Mr. Weeks: You can go downstairs.
Robert Clayton: Leave the billfold?
Mr. van Sise: You can take that with you.

(There was no further questioning. The above ended at five forty-five a. m.)

APPENDIX C

Stenographic Transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.*

Police Headquarters
Huntington, New York

November 5, 1952

PRESENT: Robert Clayton

Walter Weeks, Investigator, D. A.'s Office
Otis Barnes, Deputy Sheriff
Victor F. Bruns, Court Stenographer

(The following occurred shortly after ten p. m.:)

QUESTIONS ASKED BY MR. WEEKS; ANSWERS BY ROBERT CLAYTON:

Q. I told you before, you have been lying and lying. We left you alone all day long, because we have just been building up stuff. I got you here tonight and talk to you. You thought to lie to me. You didn't have any money, you say; pretty near broke. You came home. When you turned the pocketbook over to Peggy, what was in it? A. When I turned the pocketbook—

Q. They cleaned you out Saturday night and you went broke. A. I never give it to her.

Q. Didn't you hide it? A. I hid it in the shoes here.

Q. The shoes was empty? A. Sure, it was empty.

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* Introduced as Petitioner's Exhibit 2 at the hearing in the District Court (Exh. 14 pp. 77, 82). This same conversation was also recorded and a further transcript of the recording was made. It was introduced as Plaintiff's Exhibit 4 in the District Court (Exh. 14 pp. 78, 82) and is Exhibit 3 before this Court. See p. 11a, n. 5 *supra*.

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Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. You were broke? A. I had some pennies in it.

Q. But you got cleaned out Saturday night? A. No, I had some money left. When I left the game, I had twenty-seven dollars left.

Q. You had twenty-seven dollars left when you left the game? A. Yes.

Q. Tell us the rest of it. Get it off your mind. As I said, you hadn't ever intended to kill the man and that it was just to get the money and get out. Get it off your mind. A. I am going to jail—just like a bit—

Q. You (will) feel better. You have a hell of a load, you have. We have been up picking up the stuff all day long, Bob. The only thing you can do is to tell the truth, Bob. Go ahead, and pray that it will help you. Now, come on. Let's have the whole story. Start Saturday night.

You got home and you were broke. You had taken Peggy's pocketbook. A. I didn't take it.

Q. She gave it to you. You lost it in the game Saturday night. A. I came back home Saturday night. I went to bed when I came back Saturday night.

Q. Hold your head up. Tell us the story, Bob. A. I was broke when I came back. I didn't have any money when I came back. I lost all I had. I lost forty-seven dollars.

Q. I heard you lost sixty-five. A. I had two tens a twenty-dollar bill, and seven or eight ones—I think, eight one-dollar bills. I had forty-seven dollars when I went over there. That is all I had.

Q. That is, when you went to the game, you had forty-seven, and you lost it? A. I was broke. I came back home. I walked all the way back home, feeling so bad.

Q. From where? From Fanny's.

Q. What time did you get home? A. I would say nine o'clock. I didn't pay much attention.

Appendix C

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. That was Saturday night? A. Saturday night. I walked all the way from there back home, came back in the house, hid the pocketbook in these shoes I got on now. I just figured somebody—

I stayed in bed there all day. I stayed in the house all day Sunday. On Sunday Candy left from there with Murray and them—Murray and those other fellows in the car.

Q. Was Popeye there with Murray? A. I don't know whether it was Popeye or not.

Q. Murray and Candy left in the car, is that right? A. And two more fellows. I still stayed in the house until about it was dark—about the first dark. I would say it was about six or six thirty I left. Told Peggy I was going uptown to get some beer. She told me to bring some candy back. I didn't have no money when I first left the house.

Just as I was headed to town, just as I passed the camp, I met Candy.

Q. Whereabouts did you meet Candy? A. Just on the outside of the camp.

Q. On the dirt road? A. Past the camp, right in front of the house.

Q. You were walking down Clay Pitts Road? A. I met Candy. He had a jug in his hand.

Q. What was in the jug? A. I don't know what was in it. He had the jug in his hand. We walked down. On the way I was talking to him. I said, "Candy, let me have some money. I borrowed (tried to borrow?) twenty dollars. I will go to work Monday. I will pay you back Wednesday."

Canry said, "No. I don't know. When some of you borrowed—"

"When I borrowed ten dollars, and I paid you."

"You are damn' right. I don't loan no fucking money."

Appendix C

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

We talked of that money. We talked all the way. We got closer. All the way—I asked Candy again, "Let me have the money. I swear I will pay you back."

Candy: "I don't loan you some of bitches any money. Learn how to save your money."

I say, "Okay,"—something like that.

Q. I can't hear. A. I didn't know—

Q. Move over. Slide over here a bit.

You asked him again for money and he said he is not going to lend anybody any damn' money any more? A. Yes, that is right.

Q. Go ahead, now. A. And I said, "I paid you back ten. Why can't you loan me some more? I paid you back."

He said, "I ain't talking to you any more. Just go to hell."

He told me to kiss his ass.

"You should not tell me that. You must be drunk." I told him, "You must be drunk."

He said, "I ain't drunk. You sons of bitches kept me up all the damn' night, gambling all the night. You sons of bitches. I can't sleep."

I was turning around the gate, turning off the dirt road, down towards the house. I was going down there. This piece of pipe was laying over there on that bench, and I know it was there, and I told Candy I hid my key under the brick; Peggy told me to lock the door when I was in there; so I locked it like she told me. And Candy stopped while I was pretending to find the key. I had the key in my pocket. It made me mad when he told me to kiss his ass,—about the money.

I know the piece of iron was there. I was fumbling for the key, and Candy said, "Did you find it?"

Q. Now, Bob, is that on the little dirt road going just inside of the potato house; is that right? A. Sure.

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Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. You went over where you knew the iron pipe was, is that right? A. The iron pipe was right there on the bench, just as you come out of my door, down a piece, about three feet I would say. It was laying down on the bench, sticking up like that.

Q. That is right near your door? A. Sure, right near my door.

Q. You went over there. Tell me what you did when you got over near the iron pipe. A. I pretend to have the key, just like I was still below. He started walking toward his door, and something told me to hit him. I hit him the first time,—

Q. What with? A. The piece of iron, I didn't know that I hit him that hard.

Q. He went down? A. Yes, he fell down to his knees. I just stood up. I knowed what I had did then. I knowed that he knowed I did it. So I stood there, every bit of five minutes, standing right still. Candy—

Q. Take it slow. A. Candy said one word. He said, "Lord have mercy!"

Q. What is that? A. "Lord have mercy!" This is what hurt me so bad. Lord's (Law's?), what do I do now? Already down there he was breathing so funny. I just figured he was going to die or something. I held him by the shoulders, by his clothes there. So I drug him around towards the cellar. I lay him right down in front of the cellar. I knowed he had the money on him at first. That is when I got it out his pockets.

Q. Where did he have it? A. He had a billfold. He only had two ten-dollar bills in it. They say he had good money; he had a money belt. I pulled his shirt over. I see a string. I pulled the string and broke it, and that is when—

Q. How much money did you get? A. All together, $230.

Q. What kind? A. A Hundred dollar, fifty dollars, twenty, and tens.

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Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. Let's get this straight. A hundred-dollar bill, fifty dollar bill,— A. And twenties. He had three tens and the rest was twenties.

Q. Tell us what kind of pocketbook he had. A. He had a light tan pocketbook, about the color of the—

Q. All right. About the color of the desk? A. That is right. Brown.

Q. You took the money out the pocketbook? A. I was scared then. I knowed what I had did then. I think about my finger prints. The first thing, I went in the house. I had some white gloves. So I put them on. I came back out and picked him up and put him over there. I climbed up in there. I pushed him under that thing.

Q. What do you mean by pushing him on it? A. It is the thing that you walk across there.

Q. That runs from one end to the other? A. I come back out then. I goes back in the house where Peggy was. I had the money.

Q. What time was this? A. This was just dark, just before Peggy and I went to town.

And I take the money out. I got scareder and scareder. When did he die himself? I got the piece of iron. I goes back up there. Candy was still breathing. "You are going to tell on me; no use to let you suffer."

So I stood there. So I hit him on the head two or three times.

Q. With the same piece of pipe. A. With the same piece of pipe. When I left there, he wasn't breathing. There was—blood coming out of his mouth.

Q. You mean gargling-like, is that what you mean? Like blood coming out of his mouth? A. When I left there he wasn't breathing any more. I had got some rags out the box and put around his head and put them on.

Q. Near the door—in front of his door? A. I put rags around his head. I didn't mention that part.

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Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. Where did you get the rags? A. Out of the box there, trying to keep the blood from getting on me.

I came back and got some more rags. After the body had landed on the front of the door, because he was bleeding bad. I was trying to keep blood from getting all over my clothes.

After I leave the last time, after I got done beating him, I came back and got the pipe and got another piece of rag. So I wiped it. I was—

Q. You threw the bar out in the woods? A. Out a little piece.

Q. What did you wrap the bar up in, Bob? A. I wrapped it up—

Q. I show you a piece of cloth we have got, "Exhibit No. 19" marked on it. It is a house coat. Do you recognize that? A. No.

Q. Where did you get the cloth from that you wrapped around the bar? A. All the cloth I got out of the box. There is a box full of cloth there. I got all the cloth out of the box. I thought it was a man's shirt. I didn't know what is was. It was dark. I wiped the bar. I thought it had my finger prints on it. I stepped about ten feet, I would say; twelve. I threw it, as far as I could.

Q. Wrapped up in the cloth? A. Sure. But I walked back about twenty feet from there. That is what hurt me. It just shine in my eyes like a diamond.

Q. What was this that was shining? A. The same thing.

Q. This cloth? A. It was dark over there. I could still see it. I walked back a little further; I still saw it. Just as I got back at the turn, I could not see it. I was wondering—you imagine how I was.

I came back in the house then. I said to Peggy, "Let's go out uptown. Get up and come on and go with me."

She said, "Okay."

She got on her clothes. I changed clothes I had got.

Appendix C

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Q. What did you do with the dungarees? A. In the box there in the house . . .

I had some dirt on my black shoes. I took out my blue pocket handkerchief and wetted it and took it off and put it in the house, too.

Q. Then you and Peggy went out? A. Me and Peggy went out.

Q. What did you tell Peggy you were going to spend on her? A. I didn't tell her.

Q. Didn't you tell her you had forty dollars and you were going to spend twenty dollars? Wasn't she a little mad at the way you were acting? A. Sure.

Q. Where did you put Candy's pocketbook, Bob? A. I put the pocketbook—I could go get it for you.

Q. You tell us where it is. A. A piece here, a piece there. I tore it up.

Q. I didn't hear. A. I burned up a social security card in the house, sure.

Q. Where did you cash the hundred-dollar bill, Bob? A. I cashed it over there in that bar.

Q. Is that Aida's bar and grill? A. I don't know.

Q. Did you cash it at the same place where you bought the bottle of liquor for four dollars and fifty cents?

Q. Where is the fifty-dollar bill? A. I got it here.

Q. Where? A. I will go get it for you.

Q. In your room? A. Sure.

Q. All the rest of the money is in the house? Behind the paper that is tacked up on the wall? One hundred and eighty dollars in the house now? A. The rest of Candy's (money).

Q. Don't you feel better that you have got this off? Do you want to talk now to Peggy? A. Sure, I would like to talk to Peggy now.

(There was a brief recess.)

Appendix C

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

(The following occurred, beginning at ten forty p. m., with Robert Clayton present, together with Peggy (Eleanora) Burnett, Walter Weeks and William Gardiner, investigators attached to the office of the District Attorney, Oatis Barnes, deputy sheriff, and the stenographer:)

Mr. Weeks: Peggy, Bob here has just told us a few things. Before he started to talk, he wanted to know if he could talk to you.

It is unfortunate. We can't let you alone. You understand that, Bob?

Robert Clayton: What do you mean?

Mr. Weeks: We can't just let the two of you here alone.

He wanted to talk to you. Do you want to?

Robert Clayton: I want to ask her a question.

Peggy, had you told about that day?

Peggy Burnett: I got to tell him about what you did.

Mr. Weeks: Did you tell Peggy what you had done?

Robert Clayton: No, I didn't tell her. I figured she might have realized it.

Mr. Weeks: Well, Peggy, we are going to have to hold you. We are going to have to ask the Court to set bail for you.

I want to say this, Bob. She is not a defendant. We have to hold her as a witness. We have to go over to your house. We have got to get the money out of your house.

Robert Clayton: If you go over, I will take you over there and get the money.

Mr. Weeks: Say anything you want to say to him, Peggy. I would like to let you alone—

Appendix C

Stenographic transcript of Robert Clayton's statement to the Suffolk County Police on November 5, 1952.

Robert Clayton: Why do you have to hold her?

Mr. Weeks: She is just being held as a witness, Bob. The reason I have to hold her: She is not from around here. She has nothing to hold her here. We will have to hold her until your trial comes up.

(Peggy Burnett burst out crying.)

Robert Clayton: She didn't help me do it. She was lying on the bed at the time I did.

Mr. Weeks: She didn't know anything about it?

Robert Clayton: No.

Mr. Weeks: Did she see you hide the money?

Peggy Burnett: (Crying) No. All I knows is the money he had that Saturday night. It was in a pocketbook.

Mr. Weeks: Did Beejay (B. J.: Benjamin James Mickens) have anything to do with it, Bob?

Robert Clayton: No. Beejay lied on me. I am not going to lie on him. He is a free man.

Mr. Weeks: Did Beejay tell you that he had seen Candy?

Robert Clayton: I walked up to the barn. I seen him. He walked up to the door. I seen him.

Mr. Weeks: When was that?

Robert Clayton: That was Monday morning. I knowed what I had did, so I didn't say nothing about it.

(The talk ended at this point.)

APPENDIX D

Stenographic Transcript of Robert Clayton's November 6, corrections of his earlier transcript.*

PLAINTIFF'S

EXHIBIT

3-

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69 Cert. 1275

Police Headquarters
Huntington, New York
November 6, 1952.

Present: Detective Sergeant William van Sise,
Huntington Town Police.

Investigator Walter Weeks, District Attorney's Office, Suffolk County.

Robert Clayton.
Victor F. Bruns, Court Stenographer.

(The following occurred at two sixteen a.m., while Mr. Weeks was reading to Robert Clayton:)

By Mr. Weeks:

Q. (Reading) "Is that the little dirt road—" That is on page 4.

I am going to read this again:

"Question: Now, Bob, is that on the little dirt road going just inside of the potato house; is that right?

"Answer: Sure.

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* Introduced as Petitioner's Exhibit 3 in the District Court (Exh. 14 pp. 78, 82).

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

You stopped me there. A. What do you mean?

Q. We are talking about the iron pipe, where the bench is. In other words, I thought you were talking about the road out near the woods. A. I didn't know the piece of iron was there.

Q. You told me the piece of iron was in there. You told me the piece of iron was in near the building, am I right; in near Candy's door? A. It was nearer my door than Candy's door.

Q. This time you don't—In other words, this is not quite clear where the pipe was. Where was the pipe? A. It was sticking up on the bench.

Q. One end was sticking up on the bench, and it was on the bench between your door and Candy's door? A. That is right; between Candy's door and my door.

Mr. Weeks: Now, I will continue to read.

By Mr. Weeks:

Q. Reading page 6, where it says here:

> "And I take the money out. I got scareder and scareder. When did he die himself. I got the piece of iron. I goes back up there. Candy was still breathing. 'You are going to tell on me; no use to let you suffer.'
>
> "So I stood there. So I hit him on the head two or three times."

I would like to ask you this, Bob. Between the time that you carried him in the cellar, did you go out and hit him or did you hit him before you carried him in? A. When I first hit him, I wrapped his head and put him in the potato cellar. I left. Before I left I hurt (hit) him with a brick.

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

By Mr. Van Sise:

Q. Outside the potato cellar?

By Mr. Weeks:

Q. When you got in the potato cellar— A. I hit him some more.

Q. Did you go in the house then, before you hit him some more? A. Sure. I got my gloves.

Q. After you carted him into the potato cellar? A. No, before I put him.

Q. After you did, what did you hit him with? A. The same piece of iron.

After I put him in the potato cellar, I comes back to the house where I laid the iron and got it and went back. When I went back, blood was coming out of his mouth,—you know. So I didn't want to see him suffer. I know I had beaten him pretty bad. So I figured he was going to die anyway.

Q. Say it again. You figured he was going to die anyway? A. I figured he was going to die. I knowed he was going to die. I hit him over the head some more.

By Mr. van Sise:

Q. Why did you put the rags around his head? A. I put some rags around here when I first picked him up.

Mr. van Sise: I wondered how he could carry him.

By Mr. Weeks:

Q. What is it that you want to correct? A. I know I had—I didn't have no white gloves.

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Q. What kind of gloves did you have? A. I had a tan glove and a yellow glove.

There is some more pages.

Q. Put your initials right here, where you said it is wrong. You can change it. Write it if you want.

Is there anything else that you want to correct? A. Can I keep this, so that then I can come back to it?

Q. All right, any time when you want to correct anything, you just tell me.

After you hit him by the building, you dragged him— A. I drag him all the way in front of the potato cellar. That is where I laid him. That is where I got the money off him.

Q. Is that the little door to the potato cellar or the big door? A. That is the little door. That is where I found the money.

Q. You took him in the potato cellar? A. Right.

Q. After you got him in the potato cellar, did you hit him with the same piece of iron? A. Sure. I came back out there to get the iron.

Q. Did you say you put his head under the walk that runs from one end of the building to the other?

(Mr. Weeks then resumed reading aloud.)

By Mr. Weeks:

Q. I am reading here. "I came back—" This is on page 6.

(Reading) "I came back and got some more rags. After the body had landed on the front of the door, because he was bleeding bad. I was trying to keep blood from getting all over my clothes."

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Now, do you want to say anything about that, "After the body had landed on the front of the door"? A. On the front of which door?

Q. That is not clear.

By Mr. van Sise:

Q. Where did the body land? A. In the front of his door.

By Mr. Weeks:

Q. That is when you put the rags around his head, after you hit him?

By Mr. Weeks:

Q. Bottom of page 7. You just said, "I had some dirt on my black shoes. I took out my blue pocket handkerchief and took it off—" A. I got a blue pocket handkerchief. There was blood.

Q. That word should be *blood* instead of "dirt." Cross out the word "dirt" and write the word *blood*. Put your initials on it. That was on page 7.

I will start reading on page 8.

By Mr. Weeks:

Q. Is that clear? I am reading on the middle of page 8, where it says about the fifty-dollar bill. Is that clear, or do you want to explain anything there? A. You asked me, after I told you about the hundred-dollar bill, you asked me about the fifty dollar (bill). I told you I could go get it for you.

Q. The question is, "Where is the fifty-dollar bill?" The answer is, "I got it here."

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Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

The next question is, "Where?" The answer is, "I will go get it for you."

Is that right? A. Sure.

(Mr. Weeks then resumed his reading.)

By Mr. Weeks:

Q. I have now read, in the presence of the stenographer and Sergeant van Sise of the Huntington Town Police, the stenographer's transcript of ten pages of a statement which you made to me. Is there anything that you want to say about this statement? A. Sure, some. Just like I said.

Q. You tell me anything that you want to change or to correct in that statement. A. I can't go back.

Q. From your memory, if you don't want to go back on each page? A. No.

Q. Let me ask you a couple of questions. Did you hit Candy over the head with a pipe or a piece of iron? A. It was a solid iron pipe.

Q. Was it the same piece of solid iron that you saw down in the police station about an hour ago, in the Huntington Police Station? A. It—it look just like it.

Q. Did you take Candy's money from him and from his billfold and from his money belt after you had hit him? A. Sure.

Q. Did you carry him from in front of his door in on through the small door of the potato house? A. Sure, but I stopped first.

Q. Is there any other explanation, Bob, that you want to give to us now to explain anything that you did or to explain anything that you might have told me before? Is there anything that you want to say to the stenographer, so that he can get it down?

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

By Mr. van Sise:

Q. Do you want to tell him about the rug there on the cement block? A. I just turned the rug over.

Q. Why? A. Because it had some blood on it.

By Mr. Weeks:

Q. Was the rug along in front of the door? A. It has been there all the time.

Q. In front of Candy's door, in front of the cement block? A. Yes.

Q. Is there anything that you want to explain, Bob, or any of your conversation, or anything that goes on the record? A. This goes on the record?

Q. Yes. That is a statement that we took from you. If there is anything you want to explain in there, we will be very glad to put it down. A. I talk fast. I can't talk slow. It is not—

Q. Do you want to stay here now and read it and explain anything you want to? A. Read back all of it again?

Q. Any part of it. We want to give you a chance to change or explain anything in that statement that you want. A. There is one change here. I will see if I can find it. That will keep me from going back through all of it. I marked it when I pass by it. In here (indicating).

Q. Wait a minute. Wait for the stenographer.

Now, Bob, you have just turned to page 5, and what is it you want to say about page 5? A. Start from the top and read down.

Q. You read it—and start and correct anything you want.

Do you want me to read?

(Reading) "Question: He went down? Answer: Yes, he fell down to his knees. I just stood up. I knowed what

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

I had did then. I knowed that he knowed I did it. So I stood there, every bit of five minutes, standing right still."

Then you said, "Candy."

Is there anything you want to change in that? A. (Reading) "I stood there, every bit of five minutes, standing right still. Candy—"

Q. Is there any part of that you want to change? A. Well, I just thought of one thing: I thought I said "Candy." You cut me off.

Q. I said, "Take it slow." A. Candy said one word, "Lord have merey!"

Q. Is there anything you want to corret in that?

A Voice: That's three words.

A. I said it one word. "Lord have-merey" is just one word to me.

Q. There is nothing you want to change in that? A. The next question, what is that.

Q. You again said, "'Lord have merey!' That is what hurt me so bad." A. It is in there, "Lord's."

Q. Read that. It is on page 5. Tell me. "Lord's, what do I do now? Already down there he was breathing so funny."

By Mr. van Sise:

Q. In other words, what did you say,—"Lord's"? "Lord have merey! What do I do now"? A. He said "Lord have merey!"

By Mr. Weeks:

Q. Then you said, "That is what hurt me so bad"? A. "That is what hurt me so bad," right. When he said, "Lord have merey!"

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Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Q. When he said, "Lord have mercy!"; that is what hurt you so bad. How do you want to correct the rest of that? It says, "Lord, what do I do now?" Do you believe you said, "Lord, what do I do now"? A. That is what I mean, right there: "What do I do now?"

Q. Is that what you said: "Lord, what do I do now?"?

By Mr. van Sise:

Q. I am not trying to tell you what to say. "Lord, what do I do now?"? A. Sure. Right.

Q. You didn't know what to do? A. Right.

By Mr. Weeks:

Q. Let's continue to read the rest of it. A. (Reading) "He was already down there. He was breathing kind of funny."

Q. It says in here, Bob, "I just figured he was going to die or something." Do you want to correct anything of that? A. Nope.

Q. Is that okay?

You said, "I held him by the shoulders, by his clothes there. So I drug him around towards the cellar. I lay him right down in front of the cellar. I knowed he had the money on him at first." A. That where you say, I laid him down in the cellar; I knowed he had the money; I don't mean it like that.

Q. Tell us what you mean. A. I laid him down. I figured that he had the money on him and then I got his billfold out of his pocket. There was only twenty dollars in it. They say he had good money; peoples said he had a money belt. I see the string. I broke the string. I pulled it out. That was what it was—the money belt.

Q. Was the money in the money belt? A. Sure.

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Q. Is there anything else you want to correct here? A. You quoted me correctly.

Q. How far did you go in school ? A. Sixth grade.

Q. Do you read the newspapers, Bob? A. Only sometimes. I come to so many words I don't know, I swear. I reads like coming to words I have to skip; I have to imagine what they might mean.

Q. Do you write letters home to your mother? A. Sure.

Q. Does your mother write letters to you? A. Sure.

Q. Are you able to read her letters? A. She's the—

Q. Were you ever in the Army? A. Sure.

Q. What branch of the service were you in? A. I was in the Fourth Air Corps.

DETECTIVE KOHLER, HUNTINGTON TOWN POLICE:

The United States Army Air Force.

Q. Where were you stationed? A. You mean the last station?

Q. During your service? A. The train(ing?) at Texas.

Q. Whereabouts in Texas? A. Shepherd (Shepard?) Field in Texas. Wichitu (Wichita?) Texas. They give the town; that is all I knows.

Q. How long were you in the Army, Bob? A. I don't know exactly. I won't say.

Q. What was your rank when you got out ? A. My rank was private.

Q. What kind of work did you do there in the Army? A. I was—I done different work. I picked up paper. I worked on the garbage truck—the books. I done a lot of different kinds of work.

Q. Do you recall your serial number, Bob? A. Sure.

Q. What? A. 14—

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Q. Go slow, please. A. 14186387.

Q. Bob, do you drive a car? A. Sure.

Q. Did you ever take a test to drive a car? A. Sure.

Q. In what state? A. Florida.

Q. Now, Bob, they are going to put you downstairs for the night. Is there anything you want to say? Is there anything you want the stenographer to take down in this statement? Any explanation that you want to give about what you did to Candy? A. Sure. I am sorry. I am sorry. I am really sorry. I am sorry that he died.

Q. Bob, after you made this statement you went out to the house with some officers to find the money; and where did you look for the money? A. In Peggy's—in what you take pictures with. I don't know the name of it.

Q. Camera? A. Camera; in Peggy's camera.

Q. Had you put the money which you got from Candy inside of Peggy's camera? A. Yes, I did.

Q. When did you put it there? A. Monday.

Q. In whose room was that camera in? A. The room we stayed in.

Q. You and Peggy? A. Right.

Q. When you went there with the officers tonight, was the money in the camera when you opened it? A. No.

Q. Later on, at the police station, did Peggy tell you—did you hear Peggy say that she had taken the money out of the camera? A. At first she said she didn't.

Q. But, later on, did she turn over to the officers $260 which she had hid on her? Did she turn it over to the officers and matron and said that was money she took out of the camera? A. I didn't see her. That is the way she gave the money, out of her clothes.

Q. Did she at that time say she had counted $270? A. That is right.

Appendix D

Stenographic transcript of Robert Clayton's November 6, corrections of his earlier transcript.

Q. Did you then turn over to the officers from your billfold nineteen dollars, which you said was part of the money that you got from Candy? A. Right.

Q. Is there anything you want to say, Bob? A. I would like to know whether I could get (send?) my mother a telegram?

Q. We will give you the opportunity. Tell the officers what you want to tell in the telegram. A. Can I get an answer back from her?

Q. Yes, if she sends it to you—which I am sure she will.

(At this point Mr. Weeks told the stenographer it was three a.m. The questioning ended at this point as well.)

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1331

ERNEST MONTANYE, Superintendent of Attica Correctional Facility,

Petitioner,

against

ROBERT CLAYTON,

Respondent.

SUPPLEMENTARY APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P.O. Address
80 Centre Street
New York, New York 10013
488-3443

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

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APPENDIX E

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69-C-1275

May 13, 1971

UNITED STATES OF AMERICA ex rel. ROBERT CLAYTON,

Petitioner,

against

VINCENT MANCUSI, Warden of Attica Prison, Attica, N. Y.,

Respondent.

APPEARANCES:

MAURICE BRILL, Esq., Attorney for Petitioner Robert Clayton

HON. LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Attorney for Respondent

MORTIMER SATTLER, Esq., Assistant Attorney General Of Counsel

BARTELS, D.J.

Petitioner, Robert Clayton, presently incarcerated in Attica Correctional Facility, Attica, N. Y., upon conviction, after a jury trial, of second degree murder, seeks his release through federal *habeas corpus*. He was sentenced to a term of thirty years to life imprisonment on February 25,

1953, and no appeal was taken from the judgment of conviction. His principal claim for release is the introduction at trial of his involuntary confessions in violation of his constitutional rights.

Pursuant to the decisions of *Jackson* v. *Denno*, 378 U.S. 368 (1964), and *People* v. *Hunfley*, 15 N.Y.2d 72 (1965), a *coram nobis* hearing was held on June 8th and 9th, 1965, in the County Court, Suffolk County, upon the issue of voluntariness. After making skeleton findings of historical fact, the County Court concluded "as a matter of fact and law" that the confessions were voluntary. That decision was affirmed by the Appellate Division, Second Department (*People* v. *Clayton*, 28 A.D.2d 543 (2nd Dept. 1967), Judge Christ dissenting upon the ground that the confessions were involuntarily obtained.[1] The Court of Appeals affirmed without opinion, 22 N.Y.2d 841 (1968), and the Supreme Court denied certiorari, 394 U.S. 909 (1969). Clayton thereupon filed the instant petition, asserting that his confessions were involuntary on the following grounds: (1) unreasonable delay in arraignment for more than sixty hours after his initial detention; (2) unlawful detention as a material witness prior to his confession; (3) subjection to continuous interrogation; (4) removal from police headquarters to the scene of the crime on two occasions; (5) denial of food and sleep during his detention; (6) failure to receive advice of the right to counsel and the right to remain silent; and (7) his limited intellectual capacity and poor education. Counsel was appointed by this court and a hearing subsequently held.

As no direct appeal was ever taken from the judgment of conviction, a certified transcript of the stenographer's trial notes was never made.[2] While certain uncertified portions of trial testimony of some witnesses (which apparently had been ordered by counsel for one or both sides during or after trial) have been produced from the files of the District Attorney, these out-of-sequence testimonial

fragments have been of only limited use to the court, and primary reliance has of necessity been placed upon the minutes of the State and Federal proceedings for collateral relief.

I

According to the *coram nobis* minutes, as supplemented by the transcript of the evidentiary hearing held in this court and portions of the trial testimony, the facts are as follows:

On November 3, 1952, at about 3 P.M., Clayton, an indigent, semi-literate potato picker on the Gozelski farm in East Northport, Long Island, was taken into custody along with approximately ten or eleven other people either employed or living at the farm, and brought to the Huntington Town Police Department headquarters for questioning in connection with a homicide which had occurred on the premises the previous day. Upon arriving at the station-house, Clayton and the others were placed in a room behind the seargent's desk, used primarily as a place for the changing of the policemen's shifts every eight hours. It was described as "a very small place," approximately 20 feet by 10 feet. The only furniture in the room consisted of a table and four or five armless wooden chairs. The lights in the room remained on all night. From time to time all through the night of November 3rd Clayton and the others were taken one at a time from the room to another, smaller room on the second floor for questioning by a group of police officers. Some questioning was also conducted in the larger room in the presence of all those in custody. Detective William Van Size, who was among others assigned to the homicide investigation, testified that he specifically spoke to Clayton at about 5 or 6 P.M. on November 3rd. At about 5 A.M. on November 4th a stenographer, Victor Bruns, was called in to transcribe a battery of questions put

to Clayton by a team of interrogators, consisting of Walter Weeks, an investigator with the District Attorney's office, Detective Van Size, and another detective, Alfred Kohler. Clayton's answers were also recorded, in the course of which he denied any connection with the homicide and in fact expressed his desire to bring the culprit to justice. The questioning lasted approximately forty-five minutes. Sometime during the late afternoon or evening of November 4th, Clayton was confronted by one B.J. Mickens, a co-worker, who stated that Clayton had killed the deceased and that he (Mickens) had helped Clayton carry the victim's body into the potato shed, where it was later discovered. Clayton nevertheless re-asserted his innocence and Mickens subsequently retracted his accusation.[3] Clayton was again questioned at 5 or 6 o'clock the evening of November 4th. At approximately 9 o'clock on the evening of November 4th Clayton and Mickens were both "arraigned" before Judge Fred Munder as "material witnesses". Immediately thereafter Clayton was remanded to the custody of the Sheriff of Suffolk County, in lieu of $10,000 bail, and placed alone in a small cell or lock-up, designed primarily for temporary detentions, containing a flat board, without a mattress, as the sole sleeping facility. He remained in that cell until he was arraigned on the charge of murder on November 6th, except for the periods he was removed for questioning.

On November 5th he was questioned several times during the day and may have been taken out to the scene of the crime that afternoon although this is not clear.[4] Following an interrogation of about one and a half to two and a half hours that evening, Clayton, in response to a series of questions propounded by Weeks, in the presence of Deputy Sheriff Otis Barnes and the stenographer, Otto Bruns, finally admitted the homicide. The interrogation was recorded on tape and by the stenographer beginning

at 10:10 P.M. on November 5th and was concluded at approximately 10:45 o'clock the same evening, although Weeks testified that the evening interrogation actually commenced at about 8 or 9 P.M.

Following this confession, Clayton, accompanied by more than ten police officers and investigators, was transported to the farm sometime around 11:30 P.M., where he proceeded to point out to the officers a number of objects connected with the homicide, which were seized by the investigators as evidence. The trial transcript reveals that further incriminating statements were made at the farm and introduced at the trial. Following Clayton's return to police headquarters, his earlier confession, which had in the meantime been transcribed from the stenographer's shorthand notes, was read to him, beginning at 2:15 A.M. on November 6th. He then dictated various changes which he later initialed, the entire process ending at about 3 A.M. At 3:12 A.M. Clayton requested permission to send a teelegram to his mother. The requeest was granted and the telegram, in which Clayton stated "I have killed a man", was admitted into evidence and read to the jury. Later that day Clayton was arraigned on a charge of murder.

II

The crucial question here presented is whether Clayton's confessions were voluntary under the "totality of the circumstances" (*Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969); *Clewis* v. *Texas*, 386 U.S. 707, 708 (1967)) and "the product of an essentially free and uncontrained choice" (*Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961)), rather than the product of a will overborne. *Lynum* v. *Illinois*, 372 U.S. 528 (1963). Upon this question, Clayton's guilt or innocence is immaterial.

After a review of all the available evidence, it is my view that the facts of this case reveal a clear pattern of

police dominance and psychological coercion which rendered the resultant confessions[5] inadmissible under the foregoing constitutional standards. Among the factors which I believe compel this conclusion are the following:

(1) During the 55-hour period of custody prior to Clayton's first inculpatory statement, he was never advised of his right to counsel, his right to remain silent, or that what he said could be used against him in evidence.[6] While the failure to advise an accused of these rights at the outset of interrogation does not automatically render confessions inadmissible in trials occurring prior to the holding in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), it is nonetheless "a significant factor in considering the voluntariness of statements later made". *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Haynes* v. *Washington*, 373 U.S. 503, 510-511 (1963); *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 610; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64 (1949).

(2) Clayton's statements were secured following an initial taking-into-custody which was apparently without probable cause and followed by 55 hours of intermittent interrogation before he confessed. Approximately 30 hours after he was brought to the stationhouse, he was illegally arraigned as a "material witness", no criminal proceedings having been formally instituted at that time against anyone in connection with the homicide, in violation of the applicable New York statute.[7] There can be no doubt that at this point Clayton had become the target of the investigation and as stated by the majority of the Appellate Division, "defendant's commitment as a material witness * * * effectively amounted to the commencement of criminal proceedings against him" (28 A.D.2d at 543). Of all those originally taken into custody, only Mickens and Clayton were held as material witnesses and thereafter segregated from the others. Had Clayton been

arraigned as a defendant, he would have thereupon been informed of his right to counsel. New York Code of Criminal Procedure, § 308. The conclusion is virtually inescapable that the "material witness" proceedings were a sham, designed to prevent Clayton from obtaining counsel and to insure his availability for further interrogation away from the modicum of societal reinforcement which had theretofore been supplied by the group of suspects. *Cf. United States ex rel. Weinstein* v. *Fay*, 333 F.2d 815 (2d Cir. 1964).

United States ex rel. Glinton v. *Denno*, 309 F.2d 543 (2d Cir. 1962), *cert. denied*, 372 U.S. 938 (1963), 339 F.2d 872 (2d Cir. 1964), *cert. denied*, 381 U.S. 929 (1965); *United States ex rel. Allen* v. *LaVallee*, 411 F.2d 241 (2d Cir. 1969), *cert. denied*, 396 U.S. 971 (1969), are not to the contrary. In the *Glinton* cases, the original detention as a material witness was valid and was subsequently rendered only technically illegal as a result of the discharge of the grand jury. In addition, Glinton was at all relevant times represented by an attorney and had been advised by the court and his attorney at his initial arraignment of his right to remain silent. While detained, Glinton made several conflicting exculpatory statements which were later used by the prosecution as evidence of his guilty mind. The statements were found to have been in all other respects voluntary. The court merely held that a statement rendered during an illegal detention was not in admissible *per se*, stating: "Where the *only basis* for alleging that due process has been violated is the use of statements obtained during an illegal detention" (emphasis supplied); a state conviction would not be upset. However, the illegal detention of the accused is a factor to be weighed in the determination of voluntariness. *Clewis* v. *Texas*, *supra*.

In *Allen*, *supra*, the court stressed that the defendant was *in fact* "a material witness" since he had been placed

at the time and place of the crime with the prime suspect. Moreover, an eye witness had indicated that Allen did not strike the victim. Considering all the testimony on this issue before this court as well as the state court *coram nobis* transcript, it is my conclusion that Clayton's arraignment as a material witness was a sham, designed by the police to retain their dominance over him until they could extract a confession.

(3) The unreasonable delay in Clayton's arraignment as a defendant until some 60 hours after being brought into custody and more than 30 hours after he had clearly became the target of the investigation, is certainly a factor in determining voluntariness. *United States ex rel. Williams* v. *Fay*, 323 F.2d 65, 69 (2d Cir. 1963), *cert. denied*, 376 U.S. 915 (1964); *United States ex rel. Wade* v. *Jackson*, 256 F.2d 7, 15 (2d Cir. 1958), *cert. denied*, 357 U.S. 908 (1958).

(4) The record indicates that Clayton's faculties might well have been impaired and his will to resist significantly eroded by inadequate sleep and food. While there is some testimony to support the County Court's finding that Clayton was "permitted to sleep," the record raises substantial concern as to whether the treatment to which he was subjected substantially and effectively precluded sleep. During his stay in the back room of the stationhouse, from the afternoon of November 3rd to about 9 P.M. on November 4th, the only facilities for sleep were the floor, a long table and five armless wooden chairs. These facilities were to accommodate the sleeping needs of about ten people. The lights were on all night, and the ingress and egress of police officers and suspects were continued throughout Clayton's presence there. Thereafter he was removed to a cell which contained only a hard board for sleeping purposes. It is conceded that he had no sleep from his initial questioning on the early evening of Novem-

ber 5th until 3 A.M. the following day, when he completed the amendment of his confession, although Weeks testified that he saw Clayton sleeping on the floor just prior to the interrogation on the evening of the 5th. One witness stated "I recall them all lounging around the back room of the office, both on the floor, on the chairs and like that there" and "They were lounging around with their eyes closed and just generally lounging in the back." Detective Van Size stated, "Some were sleeping on the table. One guy was sleeping under the table." At the hearing before this court, the stenographer testified that at the interrogation during which Clayton amended his confession "there was a sense of fatigue" and "a stumbling over words." Thus, there can be little doubt that while Clayton may have been permitted to assume a supine position, any sleep he may have attained was hardly adequate to refresh himself and sustain his ability to resist continued questioning. *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698, 701 (2d Cir. 1955), *cert. denied*, 305 U.S. 896 (1955); *cf. Davis* v. *North Carolina*, *supra*, 384 U.S. at 746; *United States ex rel. Castro* v. *LaVallee*, 282 F.Supp. 718 (S.D.N.Y. 1968). Similarly, while there is also some evidence to support the County Court's finding that Clayton was "fed at regular intervals," the court entertains substantial doubt that the limited menu of hamburger and coffee over a period of over sixty hours was under his conditions of confinement adequate to renew Clayton's physical strength and his will to resist interrogation. *Davis* v. *North Carolina*, *supra*, 384 U.S. at 747.[8]

(5) The testimony of the witnesses as well as the transcripts of the various interrogations of Mickens and Clayton indicate that the suspects were exposed to persistent interrogation not by one but a team of interrogators. For example, during the questioning of Clayton in the early morning hours of November 4th, during which time he

denied knowing the perpetrator of the crime, Weeks, Van Size and Kohler alternately fired questions at Clayton. Such a procedure has long been recognized as a significant factor in determining the voluntary character of a confession.[9] *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Spano* v. *New York*, 360 U.S. 315 (1959); *Greenwald* v. *Wisconsin*, 390 U.S. 519 (1968).[10] This is particularly true where the accused did not make a narrative statement but rather, as here, was subjected to the leading questions of skillful prosecutors in a question and answer confession.[10] *Spano* v. *New York, supra*, 360 U.S. at 322.

(6) The continual questioning of Clayton over the course of two and a half days' custody must have had a substantial effect in eroding his will to resist. As aptly observed by the Supreme Court in *Culombe* v. *Connecticut*, *supra*, 367 U.S. at 575:

> "* * * questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer. This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every reason to believe that he will be held and interrogated until he speaks."

Cf. Davis v. *North Carolina*, *supra*, 384 U.S. at 752. This suggestion was especially applicable where Clayton was, at the outset, detained in a room with a number of co-workers, thus providing limited societal reinforcement, but was later removed to the confines of a small cell where his contacts were limited almost exclusively to the police.

The somewhat corroborative trial testimony of Elinora Burnett, Clayton's girlfriend, as to Clayton's guilt, does not lead me to believe that the introduction into evidence

of Clayton's confessions was harmless error beyond a reasonable doubt. Accordingly, Clayton's conviction must be overturned. See *United States v. Castello*, 426 F.2d 903 (2d Cir. 1970); *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

III

The State urges essentially two grounds for denial of the writ. First, it contends that the confessions were not the product of a will overborne, but rather were the result of the normal psychological drive to confess. It strongly advances the argument that the first confession was a direct result of the interrogators' confrontation of Clayton with the fact that one Mrs. Spatafora, the owner of a nearby bar, had identified Elinora Burnett, Clayton's girlfriend, as the woman who accompanied the man who cashed a $100 bill at her establishment shortly after the homicide. At the hearing before this court all parties, as well as the court itself, attempted to explore the incident more fully but to little avail. The memories of the witnesses had, understandably dimmed in the eighteen-year interval since the trial and their testimony in this area was vague and, in some respects contradictory. Consequently, they were unable to specify with any assurance the time of the confrontation, relative to the time of the confession, or otherwise, or the circumstances under which the incident occurred.[11] Moreover, it is not at all certain that Clayton's knowledge that the police had such information (which taken by itself would seem rather inconclusive on the issue of Clayton's guilt) would have prompted Clayton's confession had he not been subjected to the prior treatment outlined above. Even if one were to consider the aforementioned confrontation as the first direct accusation of Clayton or to infer that a direct accusation immediately

followed the confrontation, it would be necessary, under the circumstances, to consider the Supreme Court's observation that where one in custody is not directly accused of the crime "until after a substantial period of eroding his will to resist by a tangential line of interrogation" the "coercive influence brought to bear upon him" is not thereby reduced. *Davis* v. *North Carolina*, *supra*, 384 U.S. at 752.

Next, the State's attorney suggests that in light of the State court's post-hearing adverse determination of Clayton's claims, it was improper for this court to hold a hearing or reach a contrary conclusion on the issue of voluntariness without first determining that the State court proceedings fell within one or more of the eight criteria enumerated in 28 U.S.C. § 2254(d).[12] That this court has the inherent power to hold an evidentiary hearing on any petition for a writ of *habeas corpus* alleging facts which, if proved, would entitle the petitioner to relief, cannot be doubted. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963); *Procunier* v. *Atchley*, 400 U.S. 446 (1971). The instant petition alleges such facts.

In any event, the court made it clear from the beginning that it would not re-determine those purely historical facts as reliably found by the County Court. Recognizing that the *coram nobis* proceedings were held more than thirteen years after the events in issue, when the memories of many witnesses had understandably faded, as well as the fact that some issues might have been more fully explored by the County Court, the court concluded that a more detailed exploration of the underlying facts was necessary, as a supplement to the State record, if the ultimate determination of voluntariness was to be properly reviewed. It was concerned with the County Court's rejection of all testimony respecting Clayton's advisement *vel non* of his rights before interrogation. At the State *coram nobis*

hearing, Judge Stark curtailed Clayton's attorney from eliciting whether Clayton had been advised of his right to counsel and his right to remain silent, stating "I am not going to consider that issue at all. * * * And it's totally irrelevant." Clearly, there was no finding by the County Court as to Clayton's advisement, and the rejection of such testimony, in view of other substantial evidence that actual coercion was exerted to overcome Clayton's will, raised a question as to the validity of the ultimate determination of voluntariness by the State court. *Compare, Procunier* v. *Atchley, supra; United States ex rel. Hughes* v. *McMann*, 405 F.2d 773 (2d Cir. 1968).

The issue of voluntariness under "the totality of the circumstances" is one of those mixed questions of law and fact, the determination of which is the very function of this court in *habeas corpus* proceedings. *Townsend* v. *Sain, supra; Watts* v. *Indiana, supra.* As the Supreme Court observed in *Townsend, supra*, 372 U.S. at 309, n. 6:

> "By 'issues of fact' we mean to refer to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators * * *.' Brown v. Allen, 344 U.S. 443, 506 * * * (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense."

In *Watts, supra*, 338 U.S. at 51, the court also said:

> "* * * 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such

> standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication."

Accord, Imbler v. *State of California*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970).

Even were the court to treat voluntariness as a "factual issue" within the meaning of 28 U.S.C. § 2254(d) (*cf. United States ex rel. Coleman* v. *Mancusi*, 423 F.2d 985 (2d Cir. 1970), *cert. denied*, 400 U.S. 842 (1970)), it concludes that such determination by the County Court in this case is not fairly supported by the record (28 U.S.C. § 2254 (d)(8)) and hence subject to redetermination after an evidentiary hearing in this court. See *United States ex rel. Burns* v. *LaVallee*, 436 F.2d 1352 (2d Cir. 1970).

IV

In view of the judgment that the introduction into evidence of the confessions violated due process, it is unnecessary to decide the interesting question presented for the first time on oral argument, that the confessions, as the fruit of an unlawful arrest and detention, were rendered *per se* involuntary and inadmissible.[13] Nor is it necessray to entertain Clayton's claim under *Bruton* v. *United States*, 391 U.S. 123 (1968), which, we note in passing, has not as yet been presented to the State courts and is therefore not properly before us. *United States ex rel. Sloan* v. *McMann*, 415 F.2d 275 (2d Cir. 1969); *United States ex rel. Headly* v. *Mancusi*, 415 F.2d 277 (2d Cir. 1969), *cert. denied*, 399 U.S. 932 (1970).

Accordingly, Clayton's conviction must be overturned, and his petition for a writ of *habeas corpus* is hereby granted. He is therefore ordered released from custody

unless he is retried or an appeal is taken from this order within thirty (30) days from the date of the entry hereof. This is an order.

JOHN R. BARTELS
United States District Judge

FOOTNOTES

[1] The majority held that Clayton's illegal commitment as a material witness effectively amounted to the commencement of criminal proceedings against him, but that New York cases declaring confessions obtained thereafter inadmissible *per se* were not to be accorded retroactive application. The question of voluntariness under the totality of the circumstances was not discussed by the majority.

[2] The District Attorney's office of Suffolk County has informed the court that such a transcript is unavailable. Apparently, two stenographers were assigned to Clayton's trial. One has lost or destroyed his notes, and the other is retired and cannot be located.

[3] Prior to these events, on the afternoon of November 3rd, Mickens had confessed to the murder, but immediately thereafter recanted that confession. A later police investigation revealed that Mickens could not have been at the farm at the time of the homicide.

[4] The testimony on this point is contradictory. At the State *coram nobis* hearing, Van Size testified that Clayton was taken to the farm on the afternoon of the 5th. However, Judge Stark's findings of fact were silent as to a trip at that time. At the hearing before his court, an attempted exploration of the matter resulted in considerable confusion, Van Size insisting that while Clayton was taken to the farm on two occasions, both trips occurred subsequent to the confession on the evening of the 6th. A careful reading of the trial testimony of Kohler, however, suggests that, in all, three trips to the farm were made. The first, *without* Clayton, was made by a number of police officers on the afternoon of the 5th; the second, *with Clayton*, was made following the confession on the evening of the 5th; and the third, also with Clayton, was made on the afternoon of the 6th, subsequent to his amendment of the prior confession.

[5] As best as can be determined from the fragmentary record, a typewritten transcript of the stenographer's shorthand notes taken at Huntington Police Headquarters on November 7, 1952, when a

wire recording of the initial confession was played back, was introduced into evidence at the trial as People's Exhibit 30. In addition, the uncertified portions of trial transcript reveal that the stenographer read into the record a transcript of his original shorthand notes made during the initial confession on the evening of the 5th. There are some minor variations between the two transcripts. The stenographer also read into the record the transcript of his notes of the interrogation in the early morning hours of the 6th, during which Clayton amended in some respects his earlier confession.

[6] At the hearing before this court, Weeks testified that just prior to the questioning of Clayton on the evening of the 5th, he advised Clayton that anything he said could be held against him in a court of law. However, the stenographer's transcript of the questioning does not indicate that any such warning was given. In any event, Weeks admitted that he never advised Clayton of any other of his constitutional rights during the period prior to the confession.

[7] New York Code of Criminal Procedure, § 618-b.

[8] While there was testimony by Weeks at the *coram nobis* hearing that he saw Clayton eat on the evening of the 3rd, the evening of the fourth, and on the fifth, the nature of the food was never elicited. Clayton testified at the hearing before this court that prior to confessing, he was fed only on the evening of the third, and that his meal consisted of a hamburger and coffee.

[9] While it appears that four people were present at the interrogation on the evening of the 5th, the record indicates that only Weeks propounded the final series of questions leading to the confession.

[10] The transcript of the question and answer session on the evening of November 5th reads, in part, as follows:

> "Q. Bob, I told you before you have been lying and lying. We left you alone all day long, but we have just been building up stuff. Now, I got you in here tonight to talk to you, and you continued to lie to me.
>
> You didn't have any money. You didn't do it. Pretty near broke. You came home. When you turned the pocketbook over to Peggy, what was in it? A. When I turned it over to her, when I gave it to her—
>
> * * *
>
> Q. Now, tell us the rest of it. Get it off your mind, Bob. As I said, I don't think you ever intended to kill the man. I guess it was that you just thought you were going to get the money and get out. Now, get it off your mind, Bob. A.

Somebody tell me yesterday (mumbles) I am going to jail and stretch a bit.

Q. Get it off our mind, Bob. You have a hell of a load. You have been sitting down there all day. You wondered why the hell we didn't talk to you. We have been out digging up this stuff all day long. The only thing you can do is tell the truth, Bob, and hope and pray that it will help you.

Now, come on. Let's have the whole story. Start Saturday night. * * *

* * *

Q. Hold your head up. Tell us the story, Bob."

[11] As best as can be determined, Clayton was confronted with this information sometime during the afternoon of November 5th.

[12] 28 U.S.C. § 2254(d) reads in pertinent part as follows:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merit of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over he person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record."

[13] While this question has been raised before, it has not been authoritatively answered by the Supreme Court. See *Morales* v. *State of New York*, 396 U.S. 102 (1969); *Clewis* v. *Texas*, *supra*; *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Collins* v. *Beto*, 348 F.2d 823 (5th Cir. 1965) [concurring opinion of Friendly, J.]. *Cf. United States* v. *Edmons*, 432 F.2d 577 (2d Cir. 1970).

APPENDIX F

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 218—September Term, 1971.

(Argued October 8, 1971 Decided January 17, 1972.)

DOCKET NO. 71-1696

HON. VINCENT A. MANCUSI, Warden
Attica State Prison,
Respondent-Appellant,

v.

UNITED STATES *ex rel.* ROBERT CLAYTON,
Petitioner-Appellee.

Before:

WATERMAN and SMITH, *Circuit Judges,*
and ZAMPANO,* *District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* 326 F. Supp. 1366 (E.D.N.Y. 1971), granting petitioner's writ of *habeas corpus* and directing his release unless he is granted a new trial.

Affirmed.

* United States District Judge for the District of Connecticut, sitting by designation.

SAMUEL A. HIRSHOWITZ, First Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Amy Juviler, Assistant Attorney General, of counsel), *for Respondent-Appellant.*

FREDERIC BLOCK, Centereach, New York, *for Petitioner-Appellee.*

ZAMPANO, *District Judge:*

This is an appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *J.*, granting petitioner's writ of *habeas corpus* and directing his release unless he is retried by the state.

Petitioner, Robert Clayton, was convicted of second degree murder on February 25, 1953, after a trial in which his confession was introduced as evidence. He did not appeal his conviction, but in 1965 sought relief in a *coram nobis* hearing in the County Court, Suffolk County, asserting that his confession was involuntary. That court denied relief on the ground that the confession was a voluntary one. The Appellate Division, Second Department, and the Court of Appeals affirmed, whereupon petitioner unsuccessfully sought *certiorari* in the United States Supreme Court. Petitioner then commenced this action for a writ of *habeas corpus* in the District Court which held an extensive hearing and granted the writ based upon its finding that the confession was involuntary.

The facts surrounding the making of the confession are set forth in Judge Bartels' comprehensive opinion below, 326 F.Supp. 1366 (E.D.N.Y. 1971); therefore only a brief summary is necessary. Petitioner, a semi-literate itinerant farm worker, was taken into custody along with 11 others at about three o'clock in the afternoon of November 3, 1952,

as part of an investigation into a homicide which had occurred the previous day on the farm where he was working. Except for repeated periods of questioning in another room by the police, he was confined in a small and practically bare room with the others throughout the night and the next day. On November 4th a co-worker implicated petitioner in the murder after first having given a false confession himself, and that evening petitioner was "arraigned" as a "material witness." At no time was petitioner informed of his rights. Thereafter he was isolated from the others who were taken into custody with him, and he alternated between interrogation sessions with the police and confinement in a small cell with only a flat board for sleeping. The record is not clear as to whether, and how adequately, petitioner slept and ate. He finally confessed to the murder late in the evening of November 5th, approximately 55 hours after having been taken into custody. The interrogation was finally concluded at approximately three o'clock in the morning of the next day, November 6th, and later that day he was arraigned as a defendant.

The District Court relied on six factors to support its conclusion that the confession, under all the circumstances, was involuntarily made: (1) the failure to advise petitioner, an indigent and uneducated suspect, of his rights to counsel and to remain silent; (2) the "sham" arraignment as a material witness for the purpose of retaining police dominance over petitioner; (3) the unreasonable delay in arraignment as a defendant for over 60 hours after having been taken into custody; (4) doubt that petitioner had adequate food and sleep; (5) persistent interrogation by a skilled team of investigators; and (6) continual questioning over a period of two and a half days.

In reaching its conclusion the District Court applied the test, whether the confession was voluntary under "the totality of the circumstances," which is conceded by appel-

lant to be the correct legal standard. See, *e.g.*, *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969). Appellant nevertheless disputes the validity of the factors on which the District Court relied, attacking each in turn as being insufficient in itself to show coercion. While appellant may be correct were each factor considered in isolation, such a position is only peripherally relevant. Because of the inherent complexity of a judgment which must depend upon the simultaneous weighing of various circumstances, the process of determining voluntariness involves more than "a mere color-matching of cases." *Beecher* v. *Alabama*, 389 U.S. 35, 38 (1967). Rather, the touchstone in evaluating all the factors surrounding the making of a confession is the principle that the confession is voluntary if it is the product of an essentially free and unconstrained choice and involuntary if the product of a will overborne. *Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963), *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961).

It seems clear that petitioner's persistent denials of guilt throughout two days of constant police questioning and despite a direct accusation by a co-worker demonstrate that it was his will not to confess. The appellant suggests that it was the petitioner's free choice to change his mind because he learned that a bar owner had identified the petitioner's girlfriend as the person who accompanied a "man who cashed a $100 bill at her establishment shortly after the homicide." This rather inconclusive piece of evidence, it is argued, was the catalyst which stimulated the petitioner's "normal psychological drive to confess." Judge Bartels found, and we agree, that this bit of information would hardly have prompted the petitioner to confess. Rather, it is apparent that the petitioner's lack of education and knowledge of his rights coupled with the circumstances of prolonged custody and repeated periods of questioning by trained interrogators convinced the petitioner that "the

police wanted answers and were determined to get them." *Culombe, supra,* at 625. There is little doubt that petitioner was under tremendous psychological strain and physical discomfort. The only way obvious to him to reduce these coercive influences was to do and say what the police demanded of him. Under these circumstances, we conclude that the findings of the District Court that the petitioner's will was eroded and that the confession was a result of a pattern of police dominance and coercion were not erroneous.

Appellant further argues, independently of the question of the voluntariness *vel non* of the confession, that the judgment of the District Court should be reversed because it exceeded its authority when it held a hearing and redetermined issues previously decided by the state courts. However, in applying the legal standard of voluntariness to the historical facts surrounding the confession, the determination which results is not a conclusion of fact but one of law, or at most a mixture of fact and law. See *Jackson* v. *Denno,* 378 U.S. 368, 391 (1964); *United States ex rel. Burns* v. *LaVallee,* 436 F.2d 1352, 1356 (2 Cir. 1970), *cert. denied,* 402 U.S. 1012 (1971). Therefore the District Court properly redetermined the federal constitutional question for itself. *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963).

Moreover, it was proper under the facts of this case for the District Court to hold an evidentiary hearing. It was by no means clear that the County Court applied the correct constitutional standard in ruling on the voluntariness of the confession. That court excluded evidence on whether petitioner was advised of his rights on the ground that it was irrelevant although the lack of such advice was a circumstance which had some bearing on the issue of voluntariness. It made no findings with respect to the propriety of the arraignment of petitioner as a material witness and the delay in arraignment as a suspect until after he had

confessed, factors which likewise must weigh in the balance. Finally, the Appellate Division in affirming the County Court relied on certain principles of nonretroactivity which are not relevant in making a judgment under "the totality of the circumstances." *Davis* v. *North Carolina*, 384 U.S. 737, 740 (1966). Because it was not clear that the County Court applied the correct standard, and because its findings of fact were, as the District Court characterized them, "skeletal," it was proper to hold an evidentiary hearing rather than attempting to reconstruct the facts from the state court record. *Townsend* v. *Sain*, *supra*, at 314; *United States ex rel. Liss* v. *Mancusi*, 427 F.2d 225, 229 (2 Cir. 1970). The District Court, having found that "a more detailed exploration of the underlying facts was necessary," fully complied with the requirements of 28 U.S.C. § 2254(d).

Accordingly, the judgment of the District Court is affirmed.

APPENDIX G

Order for hearing issued by District Court

ORDER FOR HEARING

68-C-1275

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA ex rel. ROBERT CLAYTON,
Petitioner,

against

VINCENT MANCUSI, Warden of Attica Prison, Attica, N.Y.,
Respondent.

Upon reading the petition and the return filed by the Attorney General of the State of New York in the above entitled action, and after due consideration, it is hereby

ORDERED that the Attorney General of the State of New York, as attorney for the respondent, show cause at a hearing to be held before this Court on the 1st day of July, 1970, at 10 A.M., Courtroom No. 4, why a writ of *habeas corpus* should not be issued.

Service of a copy of this Order shall be made by the Clerk of this Court by mailing a copy thereof to the Attorney General of the State of New York, 80 Centre Street, New York, N.Y. 10013, and by mailing a copy of this Order to the petitioner and to his attorney, Maurice Brill, Esq., 291 Broadway, New York, N.Y. 10007.

Dated: Brooklyn, N.Y.,
June 16, 1970.

JOHN R. BARTELS
United States District Judge.

APPENDIX H

Order for a stay granted by the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-two.

United States ex rel. Robert Clayton,
Relator-Appellee,

v.

Vincent R. Mancusi,
Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated January 28, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is granted.

It is further ordered that

s/ STERRY R. WATERMAN
Sterry R. Waterman
J. Joseph Smith, U.S.C.J.

Circuit Judges

s/ ROBERT C. ZAMPANO
Robert C. Zampano
U.S.D.J.

APPENDIX I

Order for bail granted by the Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of March, one thousand nine hundred and seventy-two.

United States ex rel. Robert Clayton,

Relator-Appellee,

v.

Vincent R. Mancusi,

Respondent-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated March 16, 1972, for bail be and it hereby is granted.

It is further ordered that bail may be set at $500 personal recognizance without surety.

s/ STERRY R. WATERMAN
Sterry R. Waterman (per JJS)

s/ J. JOSEPH SMITH
J. Joseph Smith

Circuit Judges